

Before the
TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

REC'D TR
REGULATORY AUTH.
01 NOV 13 AM 10 38

In the Matter of

OFFICE OF THE
EXECUTIVE SECRETARY

Complaint of BellSouth Telecommunications, Inc.)
Regarding the Practices of VarTec Telecom, Inc.,)
d/b/a VarTec Telecom and Clear Choice Communications) Docket 01-0906
Company, in the Reporting of Percent Interstate)
Usage for Compensation for Jurisdictional)
Access Services)

**ANSWER, AFFIRMATIVE DEFENSES, AND
COUNTERCLAIM OF VARTEC TELECOM, INC.**

Now comes Defendant VarTec Telecom, Inc., d/b/a as
VarTec Telecom and d/b/a Clear Choice Communications
("VarTec"), and submits the following response to the
Complaint by Plaintiff BellSouth Telecommunications, Inc.
("BellSouth"), pursuant to Tennessee Regulatory Authority
Rule 1220-1-2-.04

Answer

1. The allegations of Complaint paragraph 1 are admitted.
2. The allegations of Complaint paragraph 2 are admitted.
3. The allegations of Complaint paragraph 3 are admitted.

4. The allegations of Complaint paragraph 4 are admitted.

5. The general allegation of the first sentence of Complaint paragraph 5 that the rates of intrastate and interstate access can vary is correct and therefore is admitted. However, BellSouth makes no allegations regarding specific differences in intrastate access rates in Tennessee and interstate access rates at relevant time periods, and thus VarTec's response is necessarily only to BellSouth's general allegation. In the second sentence of paragraph 5 of the Complaint BellSouth alleges that calls that originate and terminate in Tennessee are intrastate. The allegation is of course true in most circumstances, however, a few exceptions exist in certain technical scenarios.¹ The allegations in the remaining sentences of Complaint paragraph 5 are admitted.

6. The allegations of paragraph 6 of the Complaint are admitted in part and denied in part. BellSouth's description of the process for using Percent Interstate Use ("PIU") information to calculate bills for interstate

¹ See, e.g., 47 CFR § 36.154(a) (100% of traffic over private lines is deemed to be interstate if at least 10% of calls over that private line are in fact interstate); BellSouth FCC Tariff No. 1 Sec. 2.3.10(A)(1)(a) ("Entry / Exit Surrogate" deeming certain in-state calls to be interstate).

access service and intrastate access service is generally correct. However, VarTec denies any allegation in the paragraph concerning how PIU is to be "determined."

Prior to tariff amendments accepted by the Tennessee Regulatory Authority in or about May 2000, BellSouth utilized PIU reports, which are estimates provided by long distance carriers.² Only via the tariff amendments did BellSouth obtain the right on a going forward basis to "determine PIU" rather than use PIU reports.

7. The allegations of the first sentence of paragraph 7 are admitted. The allegations of the next two sentences of paragraph 7 concern the technical capabilities of BellSouth's own network; accordingly VarTec is without sufficient information to admit or deny such allegations at this time and therefore denies them. VarTec admits in part and denies in part the allegations of the final three sentence of paragraph 7. VarTec admits that BellSouth utilized (and in some cases may still utilize) PIU reports from long distance carriers to calculate bills; however VarTec denies the general allegation of reliance as on information and belief BellSouth for many years simply made

² See, e.g., BellSouth Transmittal No. 543, filed with the FCC on April 26, 2000, and corresponding revisions to the BellSouth Tennessee tariff.

a business judgment to accept PIU reports, which BellSouth has conceded are estimates, without necessarily relying upon their accuracy. Finally, VarTec notes that the allegations of paragraph 7 concern BellSouth's interaction with long distance companies in general and not specifically with VarTec; therefore the response is general in nature.

8. The allegations of paragraph 8 are admitted in that VarTec agrees that PIU reports do impact a long distance carrier's cost of doing business. Except as admitted above, the allegations are denied. The allegations concern BellSouth's interaction with long distance companies in general and not specifically with VarTec; therefore the response is general in nature.

9. In paragraph 9, BellSouth alleges that it has installed a new computer system with certain measuring capabilities. VarTec is without knowledge to affirm or deny what BellSouth alleges about the capabilities of BellSouth's equipment and therefore must deny the allegations of this paragraph.

10. The allegations of paragraph 10 are denied. BellSouth is evidently attempting to take a measurement of Percent Interstate Usage BellSouth made based on traffic recently monitored by the Agilent system and project that

measurement back in time in order to hypothesize the PIU the Agilent system would have measured had it been in place in the 1994 through 1999 time period. On the basis of this extrapolation, BellSouth rejects all the PIU reports VarTec submitted on a quarterly basis during that time period, and demands \$1,052,038. However, traffic conditions change and PIU changes over time, as have VarTec's PIU reports. The extrapolation does not suffice to establish liability on the part of VarTec to BellSouth. Rather, the reports that VarTec submitted on a quarterly basis without objection, and after a careful examination of call detail records, were contemporaneous good-faith estimates of PIU and continue to govern. VarTec further notes that BellSouth has conceded that in two states (Georgia and Louisiana) VarTec reported estimated PIU in excess of actual PIU, such that VarTec overpaid and BellSouth would likely owe VarTec a refund following completion of an audit.

11. The allegations of paragraph 11 are denied.

12. The allegations of paragraph 12 are denied.

VarTec notes that it has reviewed certain call detail records supporting its PIU reports beginning January 1, 2000 and has tendered the amount believed by VarTec to be a fair adjustment to BellSouth (as part of a larger check

covering multiple states). BellSouth has refused to accept that check.

13. The allegations of paragraph 13 are admitted in part and denied in part. VarTec admits that BellSouth has presented a written claim to VarTec and has requested information from VarTec and that the parties have exchanged some documentation; otherwise the allegations are denied.³

14. The allegations of paragraph 14 are denied.

15. With respect to the prayers for relief in BellSouth's Complaint, VarTec denies that BellSouth is entitled to relief.⁴

Affirmative Defenses

16. BellSouth's claim is barred in full or in part for the reasons stated below.⁵

³ VarTec notes that despite repeated requests, BellSouth has refused to supply the call detail records allegedly used by the Aligent system in preparation of BellSouth's claim. BellSouth's refusal violates 47 U.S.C. Sec. 222(c) (2), which entitles VarTec to receive information from BellSouth on VarTec's usage of BellSouth's network.

⁴ With specific respect to the claim for late fees, VarTec notes that BellSouth did not make a claim regarding PIU reporting until August, 2000, which is the earliest possible date from which any late fees might run, as VarTec could not be "late" in paying a bill it never received.

⁵ By listing each reason independently as an Affirmative Defense, VarTec does not assume the burden of proof on any issue for which that burden is properly on BellSouth, but is simply providing BellSouth with notice of matters that are not addressed in the Complaint but bar or limit the relief sought.

17. Estoppel.

BellSouth seeks to retroactively adjust VarTec's reported PIU for the 1994 through 2000 period. During each year from 1994 through 2000, BellSouth was entitled to audit the call detail records VarTec utilized to develop the PIU it reported to BellSouth. However, BellSouth never commenced an audit until August, 2000. BellSouth's decision to utilize VarTec's PIU reports without objection for so many years rather than audit them constituted an implied representation that the reports were acceptable and led VarTec to reasonably believe that amounts paid by VarTec to BellSouth for access services were final. Moreover, BellSouth in its Tennessee and Federal tariffs directed VarTec to keep call detail records for six months after submission of the report based on those records.⁶ In reasonable reliance on the apparent finality of the payments and BellSouth's statement that the call detail records that support a six month retention period was sufficient, VarTec has not maintained call detail records in any readily reconstructable form for earlier periods.

⁶ BellSouth Tennessee Access Tariff Section E2.3.14(C)(1) ("Tennessee tariff"); BellSouth FCC Tariff No. 1 Sec. 2.3.10(C)(1) ("Federal tariff").

As the call detail reports constitute the basis for the reported PIU for 1994-2000, and as VarTec reasonably made business plans on the belief that payments to BellSouth for access services were final, VarTec has been prejudiced by BellSouth's delay and, as to matters predating January 1, 2000, the Complaint is barred by estoppel.

18. Laches.

As to matters predating January 1, 2000, the complaint is barred by laches, for the reasons stated in paragraph 16 above, and on account of any additional evidence that it may develop is not available due to the passage of time and the unreasonable delay on the part of BellSouth in bringing its claim.

19. Unreasonable Backbilling by Common Carrier.

A common carrier that engages in unreasonable delay between the provision of services and billing for such services commits an unjust and unreasonable action in violation of Tennessee Code Sec. 64-4-115 and 47 U.S.C. Sec. 201 and those violations bar collection of the delayed bill. See *Brooten v. AT&T.*, 12 F.C.C. Rec. 13343 (1997). BellSouth's delay in demanding additional payment for services that BellSouth provided and that VarTec initially paid for in 1994, 1995, 1996, 1997, 1998, and 1999 is unreasonable, particularly in light of the continuing right

BellSouth had to audit VarTec PIU reports during those time periods, and that delay bars this action as to events occurring prior to January 1, 2000.

20. Failure to Exhaust Tariffed Procedures for Resolution of Percent Interstate Usage Disputes

BellSouth's state and Federal tariff set forth a comprehensive procedure for resolution of PIU disputes that BellSouth has not followed in this case. The procedure begins with initiation of an audit and appointment of an auditor, continues with performance of the audit and application of the audit results to retroactively readjust PIU reports for a limited period of time set forth in the tariff, and culminates in the opportunity to contest audit results by litigation, commercial arbitration or a regulatory proceeding.⁷ BellSouth began the audit procedure in August, 2000 with a letter to VarTec requesting information supporting PIU reports, which letter was under Section 2.3.10(B)(1) of the Federal tariff and Section E2.3.14(B)(1) of the Tennessee tariff "deemed to initiate an audit." However, BellSouth has not completed the audit procedure, and has claimed it does not want to audit VarTec's PIU. Because the audit process balances the

⁷ Tennessee Tariff Sec. E2.3.14B through E2.3.14E; Federal Tariff Secs. 2.3.10(B) through 2.3.10(E).

right of BellSouth to verify PIU reports with the right of the long distance carrier to be free from unreasonably burdensome verification procedures, and because the audit process described above is the exclusive PIU dispute process set forth in the tariff, BellSouth's must initiate and complete the audit process if it wishes to readjust a customer's PIU. The presence of the word "may" in the tariff language describing the first step in the dispute resolution process (initiation of an audit) signals that BellSouth may choose to accept a PIU report or may choose to audit it, but does not provide BellSouth with the third option of disputing a PIU report in an manner inconsistent with the tariffed PIU dispute resolution process.⁸

BellSouth has not completed the PIU dispute resolution process set forth in its tariff and its Complaint is therefore premature and should be dismissed.

21. Tariffed Limitation on Retroactive Adjustment of PIU

Section E.2.3.14(D) of BellSouth's Tennessee tariff and Section 2.3.10(D) of BellSouth's Federal tariff each limit the maximum time period for retroactive adjustment of previously submitted PIU reports as follows:

⁸ Tennessee Tariff Sec. E2.3.14B(1) and Federal Tariff Sec. 2.3.10(B)(1).

The PIU resulting from the audit shall be applied to the usage for the quarter the audit was completed, the quarter prior to completion of the audit, and to the usage for two (2) quarters following the completion of the audit.

Both credit and debit adjustments will be made to the customer's interstate and intrastate access charges for the specified period to accurately reflect the usage for the customers' account

This substantive limitation on retroactive adjustment of PIU applies whether or not BellSouth chooses to follow the tariff PIU dispute resolution process (this limitation cannot be avoided by the expedient of purporting not to conduct an audit) and bars any retroactive adjustment of PIU for a period earlier than specified in the limitation.

22. Waiver

BellSouth's state and Federal tariffs provided BellSouth with a specific audit remedy that BellSouth was to utilize in the event it questioned an IXC's PIU report. BellSouth never exercised that remedy until August 2000, and its decision to accept each PIU report rather than audit them constituted a waiver of claims for matters predating January 1, 2000.

23. State Statute-of-Limitation

All or part of the Complaint is barred by Tennessee Code Sections 28-3-105 and 28-3-109 or other applicable Tennessee statute-of-limitation.

24. Federal Statute-of-Limitation

All or part of the Complaint is barred by 47 U.S.C. Sec. 415(a), which states that "all actions at law by carriers for recovery of their lawful charges, or any parts thereof, shall be begun, within two years from the time the cause of action accrues, and not after," or other applicable Federal statute-of-limitation.

25. Preemption

Division of total minutes into intrastate access minutes subject to the state tariff and interstate access minutes subject to the Federal tariff must be done consistently with Federal law, including BellSouth's Federal tariff approved in *BellSouth Telecommunications, Inc.*, 8 FCC Rcd. 1403 (1993). To the extent BellSouth seeks to apply its state tariff to accomplish this division of minutes in a manner inconsistent with Federal law, such attempt is invalid.

26. Failure to State a Claim Upon Which Relief May Be Granted

For the reasons stated above, and for such other reasons as may be identified as the evidence develops, BellSouth has failed to state a claim upon which relief may be granted.

27. Subject Matter Jurisdiction

Plaintiff has not alleged a violation of the Tennessee statute or regulation by a public utility, and therefore has not invoked the subject matter jurisdiction of the Tennessee Regulatory Authority. See TRA Rule 1220-1-2-.09(1).

Counterclaim

28. Offset / Recoupment / Credit

BellSouth's Complaint alleges that VarTec paid for minutes of interstate access service that should have been classified and charged as minutes of higher-priced intrastate access service. Accordingly, should BellSouth obtain in this proceeding the right to retroactively increase the number of minutes of intrastate access service chargeable to VarTec, then VarTec is entitled to a credit for the price it previously paid for these minutes of service when they were classified as interstate access service. Alternatively, should the result of this proceeding be a determination that BellSouth must lower the number of intrastate access minutes previously billed, then VarTec should receive a refund of the price it paid for the minutes being reclassified as interstate, less a credit to BellSouth for the amount VarTec would have paid had the minutes been originally classified as interstate.

WHEREFORE, VarTec Telecom, Inc. requests:

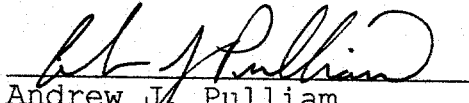
- (1) that the Complaint be Denied;
- (2) that Judgment be entered in VarTec's favor on its Counterclaim.
- (3) that BellSouth be required to utilize and complete the tariffed PIU dispute resolution procedures referenced in paragraph 20 above should BellSouth desire to pursue this PIU dispute; and
- (4) that such other and further relief as is just and proper be granted to VarTec.

Respectfully submitted,

VarTec Telecom, Inc.

By Its Attorneys

James H. Lister
McGuireWoods LLP
Washington Square
1050 Connecticut Avenue, NW
Suite 1200
Washington, DC 20036-5317
202-857-1705
202-857-1737 fax


Andrew J. Pulliam
Tennessee Bar No. A-16863
McGuireWoods LLP
1170 Peachtree Street, NE
Suite 2100
Atlanta, Georgia 30309-7649
404-443-5742
404-443-5777 fax

Dated November 13, 2001

Certificate of Service

The undersigned certifies that on this 13th day of November, 2001 he caused the forgoing Answer, Affirmative Defenses, and Counterclaim to be deposited in first-class U.S. mail for delivery to:

Hon. John Wike
Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Joelle Phillips, Esq.
Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 201
Nashville, TN 37201-3300

Wayne T. McGraw, Esq.
BellSouth Telecommunications, Inc.
365 Canal Street, Room 3060
New Orleans, LA 70130

James H. Lister By Permission
James H. Lister *bh jph*

86681